Recommendation 91-5

Facilitating the Use of Rulemaking by the National Labor Relations Board

(Adopted June 14, 1991)

The National Labor Relations Board (the Board) has formulated policy almost exclusively through the process of administrative adjudication despite having been granted both rulemaking and adjudicatory power in its statutory charter more than half a century ago. Even as rulemaking eclipsed adjudication as the preferred method of policymaking among major federal agencies, the Board steadfastly relied upon the quasi-judicial approach.

The appropriateness of agency discretion to choose between rulemaking and adjudication to determine policy has been widely acknowledged. In the last several decades, however, the use of rulemaking in major federal agencies has grown and a body of commentary and judicial opinion has encouraged and approved this trend. Agency power to use rulemaking authority to resolve by general principle issues that recur in adjudicatory hearings has been broadly asserted and approved. Gains in administrative efficiency through the use of rules have been frequently seen as outweighing the benefits of incremental policymaking through case-by-case consideration. Controversy, then, has centered on the Board's insistence on adjudication as virtually the only means for the development of policy and on the practical implications this has had for the Board's accomplishment of its regulatory mission.

The type of decisionmaking engaged in by the Board has implications for the type of data gathered by the Board and the openness of policymaking. Policy formulated in the context of case-by-case adjudication is based solely upon the argument and evidence that the parties to the proceeding offer. Rulemaking, however, offers broader opportunity for public participation and more meaningful notice to affected parties of potential changes in regulatory standards.

In addition, the choice between rulemaking and adjudication may affect the clarity and stability of the particular policy involved. In general, rulemaking provides greater clarity in the identification of a decision as a policy choice and requires that agency policy not be changed without a process focused on the policy choice. Where bright line rules are helpful and feasible, this may be an important consideration. Rulemaking also can resolve more efficiently important policy choices that would require a series of adjudications over a long period of time; thus, it can promote efficient enforcement of agency policy. Moreover, rulemaking enables the Board

to set its policymaking agenda internally and directly with a view toward enforcement needs, rather than depending on the issues presented in cases that parties choose to press.

Despite its historical reluctance to formulate policy through rulemaking, the Board announced in 1987 its intention to initiate a rulemaking proceeding to determine bargaining units in health care facilities.[1] The Board's choice of this subject for its first major substantive rulemaking is inextricably intertwined with the agency's struggle with it for almost 15 years. The Board gave two rationales for its decision to use rulemaking. First, the Board believed that there would be value in obtaining from affected parties empirical data on the effect on labor relations of unit configuration in the health care industry. Second, the Board acknowledged the longstanding criticism of its reluctance to use rulemaking as a policymaking vehicle and concluded that rulemaking, though perhaps time consuming at the outset, might prove valuable over the long term in terms of the predictability and efficiency of determinations of viable bargaining units in the health care industry.

While the notice-and-comment procedures of §553 of the APA require only an opportunity for written comments on the proposed rule, the Board decided to hold four public hearings around the country to receive oral and written comments, and to permit limited cross-examination. The Board provided for greater public participation than was strictly required because it desired to assure affected persons that there would be the fullest opportunity to participate as the Board undertook a new method of policy formulation. In addition, the Board was concerned that without oral testimony and cross-examination, it would receive (through written comments) only the kind of legal arguments that it traditionally heard in adjudications. A final rule was adopted on April 21, 1989. Judicial review was sought by the American Hospital Association (on the grounds that the rule exceeded the Board's statutory authority, the Board was required by statute to make unit determinations on a case-by-case basis, and that the rule was arbitrary and capricious).[2] The Supreme Court ultimately upheld the rule.

The Conference has examined the Board's "experiment" with rulemaking. Putting aside the particular legal issues yet unresolved in the "test" case before the courts, it seems clear that the proceeding accomplished the major putative purposes of rulemaking. First, the Board

[1] 52 FR 25,142 (1987).

[2] The U.S. District Court for the Northern District of Illinois found the rule unlawful and granted a permanent injunction against its enforcement. The U.S. Court of Appeals for the Seventh Circuit reversed the district court decision. The Supreme Court granted certiorari and issued an unanimous decision upholding the Board rule and recognizing the Board's broad rulemaking powers under 6 of the National Labor Relations Act. See 111 S. Ct. 539 (1991).

accumulated and utilized an enormous volume of empirical data that had not been available to it in previous adjudications. Second, the process provided a degree of openness and broad-scale participation unmatched by traditional Board proceedings (even in those few adjudications where amici are invited to an oral argument). Third, the product of the rulemaking is a model of clarity as expression of policy in an area historically marked by excessive subtlety and complexity. Finally, the rule, if upheld, promises a degree of stability for a policy area that had been overwhelmed by change.

It cannot be said, however, that the Board's choice to use rulemaking represents a broad new commitment to formulating national labor policy by this means. This rulemaking was an exercise in pragmatism—a thorough, careful, and productive administrative response to a particular set of circumstances. Nevertheless, the rulemaking gives the Board experience upon which it can build. This recommendation, while recognizing that the Board will justifiably continue to make policy through adjudication, suggests steps to facilitate further rulemaking by the Board. These steps include publishing standard rulemaking procedures, identifying subjects that are appropriate for rulemaking, and amending the National Labor Relations Act to include a provision that (following previous Conference recommendations) specifies an appropriate procedure for judicial review of Board rules.

Recommendation

1. The National Labor Relations Board should supplement its practice of policymaking through case-by-case adjudication by continuing to use its general rulemaking authority in appropriate situations.

2. To facilitate the rulemaking process, the Board should take the following steps:

(a) Rulemaking Procedures

The Board should publish rulemaking procedures that conform to the informal rulemaking procedures of the Administrative Procedure Act. These procedures should not require oral

hearings or other procedures in addition to notice and the opportunity for comment, as a general matter, although such additional procedures may be useful for particular rulemakings.[3]

(b) Identification of Subjects for Rulemaking

To assist the Board in identifying manageable and timely subjects for which rulemaking might be appropriate, it should consider, among others, the following factors:

(i) The need for submissions and information, including empirical data, beyond that normally available through adjudication;

(ii) The value of participation by affected persons beyond the parties likely to participate in adjudication, with particular attention to possible reliance on prior policy and the breadth of impact of a new policy;

(iii) The need to establish policy promptly in new areas of responsibility or for new enforcement initiatives;

(iv) The opportunity for stabilizing policy in the particular subject area;

(v) The likelihood that future litigation and enforcement costs may be lessened if a readily applicable rule is developed;

(vi) The need to achieve control over the subject and timing of policy review and development.

(c) Existing law

The Board should develop a policy to govern situations in which the subject of a proposed rule has already been the focus of consideration in prior adjudicatory proceedings. The Board should seek to anticipate enforcement issues that may arise during the pendency of the rulemaking and possible judicial review. During the pendency of a rulemaking, the Board and its independent General Counsel ordinarily should continue to act under its body of precedent, but they should be prepared to depart from precedent in individual cases where the application of such precedent would be unfair or inefficient.

[3] See ACUS Recommendation 76-3, "Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking," 1 CFR 305.76-3 (1990).

3. Congress should amend the National Labor Relations Act to confine pre-enforcement review of final Board rules to a single proceeding. Review should be authorized in the appropriate court of appeals.[4] This authorization should include a reasonable time limit on the seeking of preenforcement review and preclude judicial review of rules at the enforcement state concerning issues relating to whether (a) the procedures employed in the rulemaking were adequate, or (b) there was adequate support for the rule in the administrative record.[5]

Citations:

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[4] See ACUS Recommendation 75-3, "The Choice of Forum for Judicial Review of Administrative Action," 1 CFR 305.75-3 (1990).

[5] This is not meant to limit parties' ability at the enforcement stage, to challenge a rule as arbitrary and capricious as applied. See ACUS Recommendation 82-7, "Judicial Review of Rules in Enforcement Proceedings," 1 CFR 305.82-7 (1990).